

July 15, 1999

Ms. Mae Cheng, Staff Writer

Newsday, Queens Edition

80-02 Kew Gardens Road

Kew Gardens, NY 11415

Re: FOIA Appeal, your letter dated June 18, 1999

Dear Ms. Cheng:

On May 12, 1999 you filed a request under the Freedom of Information Act (FOIA) for copies of documents relating to NCUA investigations into the New York Lee Federal Credit Union (Lee FCU). Dianne Salva, NCUA's FOIA Officer, responded to your request on June 15, 1999. You received copies of three documents - two Letters of Understanding and Agreement and an NCUA News release. One hundred and fifty pages of additional documents were withheld pursuant to exemptions 5 and 8 of the FOIA. We have identified three additional documents available for release. Enclosed are the July 1997 Letter of Understanding and Agreement between Lee FCU and NCUA, an anonymous letter sent to NCUA concerning Lee FCU, dated May 14, 1998, and a short memo concerning the anonymous letter dated May 19, 1998.

We received your June 18 appeal on June 25. In order for you to better understand the use of the exemptions, you ask that we specify what type of documents were withheld and under which of the two noted exemptions they fall. Below we provide you with the types of documents withheld pursuant to exemptions 5 and 8 of the FOIA as well as a brief discussion of each of the two exemptions.

Exemption 5

Two internal memoranda and a draft letter were withheld pursuant to exemption 5. These documents contain predecisional recommendations and internal discussions of Lee FCU. They were also withheld pursuant to exemption 8, *see* discussion below. Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." 5 U.S.C.552(b)(5). Included within exemption 5 is information subject to the deliberative process privilege. The purpose of this privilege is "to prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). Any one of the following three policy purposes have been held to constitute a basis for the deliberative process privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that

might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. Russell v. Department of the Air force, 682 F.2d 1045 D.C. Cir 1982). We believe that the first and third policy reasons are applicable to the documents withheld. The three documents noted continue to be withheld pursuant to exemption 5.

Exemption 8

The following types of records were withheld pursuant to exemption 8: examination reports; correspondence and memoranda that were drafted as a result of examination findings; and a preliminary warning letter. Exemption 8 of the FOIA (5 U.S.C. 552(b)(8)) applies to information:

contained in or related to examination, operating or
condition reports prepared by, on behalf of, or for
the use of an agency responsible for the regulation
or supervision of financial institutions.

The courts have discerned two major purposes for exemption 8 from its

legislative history: 1) to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability; and 2) to promote cooperation and communication between employees and examiners. *See Atkinson v. FDIC*, 1 GDS 80,034, at 80,102 (D.D.C. 1980). Examination reports fit squarely within the language of exemption 8. Their release could reasonably harm the financial security of a credit union and interfere with the relationship between a credit union and NCUA.

Courts have held that documents related to reports withheld under exemption 8 may also be exempt from disclosure. Documents concerning a report's follow-up as well as internal memoranda that contain specific reference about a named financial institution can be withheld pursuant to exemption 8. *See Atkinson and Wachtel v. Office of Thrift Supervision*, No. 3-90-833 (M.D. Tenn. Nov. 20, 1990). Although the memos do contain some non-financial information, courts do not require agencies to segregate and disclose those portions of documents that are unrelated to the financial condition of the institution. *See Atkinson*. Hence, the memos and correspondence continue to be withheld in full pursuant to exemption 8. In addition, courts have held that records pertaining to a financial institution no longer in operation can be withheld pursuant to exemption 8. *Gregory v. FDIC*, 631 F.2d 896 (D.C. Cir. 1980).

Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court in the district where you reside, where your principle place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

/S/

Robert M. Fenner

General Counsel

GC/HMU:bhs

99-0656

SSIC 3212